

STATE OF MICHIGAN
COURT OF APPEALS

ARTHUR CARIAN,

Plaintiff-Appellant,

v

FRANKLIN L. EVANS AND DARLENE EVANS,

Defendants-Appellees.

UNPUBLISHED

January 5, 1999

No. 205986

Oakland Circuit Court

LC No. 96-518694 NO

Before: Holbrook, Jr., P.J. and O'Connell and Whitbeck, JJ.

PER CURIAM.

This is a premises liability action concerning plaintiff, Arthur Carian, who was injured by a falling pipe while working on a water heater at the home of defendants Franklin L. and Darlene Evans. Plaintiff appeals as of right from the trial court's order granting summary disposition in favor of defendants pursuant to MCR 2.116(C)(10). We reverse.

I. Basic Facts And Procedural History

Plaintiff was employed as a lead repairman for Sears. As a lead repairman, plaintiff made problem service calls, talked to irate customers and assisted fellow repairmen who were experiencing difficulties. In March of 1995, plaintiff went on a service call to defendants' home to repair a hot water heater that defendants purchased from Sears in December 1994. Even though the water heater was professionally installed, it apparently still did not work consistently.

Plaintiff arrived at defendants' house and had a brief conversation with defendant Franklin Evans. At this point, the parties' rendition of events diverges considerably. Plaintiff contends that Franklin Evans led him to the utility room where the hot water tank was located. Plaintiff states that, as he walked into the utility room, he noticed a three quarter inch galvanized pipe, approximately five and a half to six feet long, leaning against the hot water tank. Apparently, the pipe came from the old water heater. Plaintiff contends that he asked Franklin Evans if he needed the pipe. When Evans said "no," plaintiff claims that he stated: "[W]hy don't you get rid of it before somebody get[s] hurt[]?" Plaintiff claims that he then handed the pipe to Evans and turned back around to look at the hot water tank. According to plaintiff, he did not know where Evans placed the pipe.

Plaintiff claims that, after kneeling down in front of the tank, he checked the model number and looked to see if the pilot light was on. Plaintiff discovered that the pilot was not on and, in an effort to light the pilot, he stretched out directly on the floor. Plaintiff claims that immediately after he stretched out, he was hit in the head with the pipe and was knocked unconscious. Although plaintiff did not see the pipe hit him, he believes that he kicked the pipe with his foot as he was stretching out on the floor to gain access to the pilot light. Plaintiff believes that his foot made contact with something as he was lying down on the floor and states that when he woke up, the pipe was laying next to him.

Franklin Evans' version of the incident is considerably different. Evans testified at his deposition that he never walked plaintiff to his utility room and that he was not in the room with plaintiff at the time of the accident. Evans claims that from his dining room, he saw the pipe starting to fall. Evans stated that he headed toward the utility room and made it to the doorway when he saw the pipe hit plaintiff on the back of his head. Franklin states that he picked up the pipe, which had rolled down plaintiff's body and was laying across the back of plaintiff's heels. Contrary to plaintiff's testimony, Evans asserts that plaintiff was not knocked unconscious by the blow to the head. According to Evans, the pipe had been standing in a corner, which was across from the area where plaintiff was working. Evans testified that he had planned to reuse the pipe but that he did not tell plaintiff that the pipe was in the utility room.

In March of 1996, plaintiff filed his complaint alleging that defendants were negligent because: (1) they did not ascertain the condition of their property; (2) they failed to use reasonable care to make their premises safe; (3) they did not repair, fix, or guard against any dangerous, defective or unsafe condition; and (4) they failed to warn plaintiff of the unsafe condition and any risk involved.

In July of 1997, defendants filed a motion for summary disposition pursuant to MCR 2.116(C)(8) and (10). After briefing and oral arguments, the trial court granted defendants' motion for summary disposition. The trial court stated:

Now when [sic] I am saying is this so called expert repairman he should have known. I think you get these repairmen that come into your house or whatever, and if you don't make something open and obvious and you don't do more than what this Defendant did here, I can't say that a fellah should -- that's mine. I think you might have to argue this one again before the Supreme Court and -- but I am satisfied that the Defendant did all he could do in the particular matter and did what he was obligated to do, and I am going to grant the Motion.

II. Standard of Review

"This Court reviews summary disposition decisions de novo to determine whether the prevailing party was entitled to judgment as a matter of law." *Hughes v PMG Building, Inc.*, 227 Mich App 1, 4; 574 NW2d 691 (1997). A motion for summary disposition pursuant to MCR 2.116(C)(10) tests the factual support for a claim. *Hughes, supra*. After considering the pleadings, affidavits, depositions, and other documentary evidence, the trial court must grant summary disposition if there is no genuine issue regarding any material fact. *Id.* In deciding a motion for summary disposition under MCR 2.116(C)(10), "[t]he trial court must review the record evidence, make all reasonable inferences

therefrom, and determine whether a genuine issue of material fact exists, giving the nonmoving party the benefit of reasonable doubt.” *Bertrand v Alan Ford, Inc*, 449 Mich 606, 617-618; 537 NW2d 185 (1995). On appellate review of such a decision, “an appellate court must also make all reasonable inferences in the nonmoving party’s favor.” *Id.* at 618.

III. The Elements Of A Prima Facie Case Of Negligence

A. The Four Basic Elements

“To establish a prima facie case of negligence, a plaintiff must prove four elements: (1) a duty owed by the defendant to the plaintiff; (2) a breach of that duty; (3) causation; and (4) damages.” *Lawrenchuk v Riverside Arena, Inc*, 214 Mich App 431, 432; 542 NW2d 612 (1995). “Duty” is a legally recognized obligation to conform to a particular standard of conduct toward another. *Howe v Detroit Free Press, Inc*, 219 Mich App 150, 155; 555 NW2d 738 (1996). Whether a duty exists is a question of law for the court. *Mason v Royal Dequindre, Inc*, 455 Mich 391, 397; 566 NW2d 199 (1997). See also *Simko v Blake*, 448 Mich 648, 655; 532 NW2d 842 (1995). When determining whether a duty exists, courts consider a wide variety of factors, including the relationship of the parties and the foreseeability and nature of the risk. *Hughes, supra* at 5. If there is no duty, summary disposition is proper. *Eason v Coggins Memorial Christian Methodist Episcopal Church*, 210 Mich App 261, 263; 532 NW2d 882 (1995).

B. Liability to an Employee of an Independent Contractor

Generally, an owner of property is not liable to an employee of an independent contractor for negligence. *Portelli v I. R. Construction Products Co, Inc*, 218 Mich App 591, 596; 554 NW2d 591 (1996). The actual employer of the worker is, in general, “immediately responsible for job safety and for maintaining a safe workplace.” *Id.* There are two main exceptions to this general rule: (1) if the owner retains control over the work done and the contractor’s activities, or (2) if the work is inherently dangerous. *Id.* at 596-597. However, the premises owner avoids liability only when the employee of the independent contractor comes upon the premises to correct the condition that causes the injury. *Butler v Ramco-Gershenson, Inc*, 214 Mich App 521, 532 n, 6; 542 NW2d 912 (1995); *Nemeth v Detroit Edison Co*, 26 Mich App 481, 485-486; 182 NW2d 617 (1970).

Although defendants argue that they had no duty to plaintiff, as an employee of an independent contractor, for negligence, plaintiff asserts that defendants owed him the same duty of care entitled to any invitee on defendants’ premises. Because plaintiff was not injured from the condition on the premises that he was contracted to repair, plaintiff contends that liability should remain with defendants, as premises owners. Making, as we are required to do, all reasonable inferences in the nonmoving party’s favor, we agree with plaintiff.

Here, Franklin Evans admitted that the pipe that struck plaintiff was not connected with the repairs that plaintiff was on the Evans’ property to perform. Plaintiff was on the premises to repair the new water heater. The pipe was taken off of the old water heater by Evans, who wanted to save the pipe for future use. Accepting plaintiff’s version of events, he handed the pipe to Evans after looking

over the work environment for potential safety hazards. Again accepting plaintiff's version of events, Evans created the unsafe condition by placing the pipe directly behind plaintiff while he was examining the water heater. While the actual employer of the worker is responsible for job safety and for maintaining a safe workplace, plaintiff had already surveyed his work area for possible safety problems and had no reason to expect that Franklin would place the pipe in such close proximity. Because plaintiff was not injured by a condition related to the repair that was the purpose of his presence on defendants' property, we believe that defendants cannot avoid liability by asserting a lack of duty. See *Butler, supra* at 532 n, 6.

C. Plaintiff's Status As An Invitee And The Duty To Warn

The duty a premises owner owes to an individual who comes upon the owner's land depends on the status of the individual at the time of the injury. *Stanley v Town Square Coop*, 203 Mich App 143, 146; 512 NW2d 51 (1993). Based on a three-tiered approach to defining duties, an individual may be classified as an invitee, a licensee, or as a trespasser. *Id.* at 146-147. Employees of independent contractors are invitees. *Hughes, supra* at 10. See also *Butler, supra* at 532. "An invitee is a person who enters the land of another on an invitation that carries with it an implication that the owner has taken reasonable care to prepare the premises and to make them safe." *Hughes, supra* at 9-10.

A premises owner has a duty to exercise reasonable care to protect invitees from an unreasonable risk of harm caused by a dangerous condition that the owner knows or should know the invitees will not discover or protect themselves against. *Hughes, supra* at 9. Although the premises owner must warn of hidden defects, there is generally no duty to warn of "open and obvious" dangers. *Id.* at 10. "Whether a danger is open and obvious depends upon whether it is reasonable to expect an average person of ordinary intelligence to discover the danger upon casual inspection." *Id.* However, there is an exception to this rule. *Id.* Even if a danger is open and obvious, a premises owner may still have a duty to protect invitees against foreseeably dangerous conditions. *Id.*

The premises owner's duty to protect his invitees may include a duty to warn. *Id.* at 11. While there is no absolute obligation to warn of open and obvious dangers, the premises owner must exercise reasonable care to protect invitees against known or discoverable dangerous conditions. *Id.* "The rationale behind this rule is that liability for injuries incurred on defectively maintained premises should rest upon the party who is in control or possession of the premises, and, thus, is best able to prevent the injury." *Id.*; See also *Riddle v McLouth Steel Products Corp*, 440 Mich 85, 91, 485 NW2d 676 (1992).

Here, plaintiff was an invitee as he was an employee of an independent contractor hired to repair a new hot water heater on defendants' property. According to plaintiff's version of the facts, after he arrived at defendants' home, he noticed a pipe in the cramped quarters where the hot water heater was located. While kneeling down before the hot water heater, preparing to check the pilot light, plaintiff handed Franklin Evans the pipe that he believed had the potential to cause injuries. Again according to plaintiff, Evans then placed the pipe in a corner of the utility room near plaintiff.

Accepting plaintiff's allegations as true, although Evans placed the pipe in an area where an average person of ordinary intelligence would have discovered it upon casual inspection, we believe that, under plaintiff's version of the events, the risk of harm to plaintiff was unreasonable. Since Evans placed the pipe in the corner, he knew or should have known that the placement of the pipe had the potential to cause injuries. Despite the obviousness of the danger, it was foreseeable that plaintiff would fail to realize that danger in time to protect himself from it. Because plaintiff believed that he had already surveyed the work space for potential safety problems and because he gave the pipe to Evans believing that he would remove the hazard, it was foreseeable, again under plaintiff's version of the events, that plaintiff would not glance around the utility room once again to detect potential safety problems. Furthermore, since plaintiff was already kneeling down, it was foreseeable that his attention would be distracted with the task at hand, the hot water heater itself.

IV. Conclusion

The trial court erred in granting summary disposition to defendants where questions of fact remain as to defendants' duty to plaintiff. Making all reasonable inferences in plaintiff's favor, we find that there were material facts upon which a jury decision is required. We note that a court is not permitted to assess credibility or to determine facts on a motion for summary disposition. *Skinner v Square D Co*, 445 Mich 153, 161; 516 NW2d 475 (1994).

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Donald E. Holbrook, Jr.
/s/ Peter D. O'Connell
/s/ William C. Whitbeck